United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL BRIEF

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76-7062

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P/S

United States Court of Appeals

For the Second Circuit

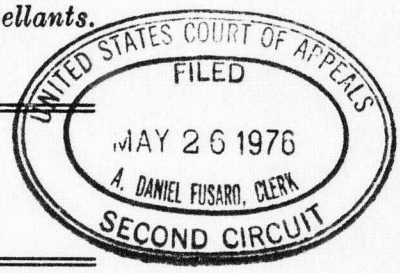
MARIA NURSE, *et al.*,
Plaintiffs-Appellants,

DARLENE K. WILLIS, individually and on behalf of all others similarly situated,
Plaintiff-Intervenor,

against

ALLIED MAINTENANCE CORPORATION, *et al.*,
Defendants,

SHEA GOULD CLIMENKO KRAMER & CASEY,
Appellants.



PLAINTIFFS-APPELLANTS' BRIEF AFTER REMAND

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ISSUES PRESENTED

May a law firm which has acted as general counsel to a labor union represent its individual members in an action against their employers to recover damages under the Equal Pay Act (29 U.S.C. §206)?

Did the District Court err in disqualifying counsel "from any further representation of plaintiffs" after they had negotiated and executed a settlement agreement which the District Court has found to be "fair, equitable and appropriate for its approval"?

Did the District Court's entry of a judgment approving the settlement agreement which counsel had negotiated render counsel's alleged conflict of interests moot?

Even if counsel's representation of plaintiffs did involve a conflict of interests (which appellants deny), did the alleged conflict so "taint" the proceedings in the District Court as to require counsel's disqualification?

STATEMENT OF THE CASE

(a) Preliminary Statement

On February 18, 1976, Hon. Charles E. Stewart, Jr., on his own motion and without a hearing, made an order disqualifying the firm of Shea Gould Climenko & Kramer [sic]("Shea Gould") from any further representation of plaintiffs in these proceedings (A 3).* Plaintiffs and Shea Gould appealed from that order and moved in this Court for a stay pending appeal and for a preference.

By order dated February 24, 1976, this Court directed that the appeal be continued, that the order of disqualification be stayed and that the action be remanded for the limited purpose of adducing additional proof on the issue of disqualification (A 4). Pursuant to this Court's order, hearings were conducted in the District Court on March 5, 11 and 12, 1976. Shea Gould and the attorneys for plaintiff intervenor Darlene Willis (whom Judge Stewart had invited to participate in the hearings as amicus curiae) presented testimony and introduced exhibits on the sole issue of disqualification.

Meanwhile, on March 1, 1976, the District Court entered a judgment approving a settlement agreement which Shea Gould had negotiated and executed as plaintiffs' attorneys, finding that the agreement was "fair, equitable and appropriate for its approval" (A 5 - A 6).

Appellants submit this brief to demonstrate that, on the basis of the record made in the District Court on remand:

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* References in the form "A " are to pages of the Appendix. Where appropriate, the name of a witness or an exhibit designation is also given.

(a) Shea Gould's representation of plaintiffs in this case involves no conflict;

(b) Shea Gould's representation of plaintiffs in this case has not resulted in any harm or prejudice to plaintiffs;

(c) the question of whether there was or was not a conflict is moot; and

(d) in any event the alleged conflict (which we deny) did not so "taint" the proceedings in the District Court as to require disqualification.

(b) Nature Of The Action.

The 641 plaintiffs in this action are female cleaners and members of Local 32J of the Service Employees International Union ("Local 32J"). Plaintiffs seek damages from their employers -- defendant Allied Maintenance Corporation ("Allied") and the building owners and managers who employ Allied -- on the ground that they have violated the Equal Pay Act of 1963, 29 U.S.C. §206(d)(1), by paying their female cleaning and maintenance employees lower wages and benefits than they pay to their male cleaning and maintenance employees in the same establishments, for work requiring equal skill, effort and responsibility. Each plaintiff affirmatively authorized Shea Gould to commence this action, and, in accordance with 29 U.S.C. §§216 and 256, each plaintiff's written authorization has been filed in the District Court.

(c) Related Actions and Prior Proceedings.

This action was commenced on or about November 7, 1974. It is one of approximately 76 equal pay lawsuits which Shea Gould has commenced on behalf of more than 6,000 plaintiffs in the United States District Court for the Southern District of New York, against approximately 289 defendants. All of the plaintiffs

are present or former members of Local 32J. The lawsuits were filed between June 19, 1974 and April 30, 1975 and involve virtually the entire cleaning and maintenance industry in the borough of Manhattan, State of New York. Most of the defendants (212) are named in the six actions which, like the present action, join as defendants the cleaning contractors which employ plaintiffs and the building owners or managers who, in turn, employ the cleaning contractors. Initially most of the actions were assigned to Judge Richard Owen. The "cleaning contractor" actions were assigned to Judge Charles E. Stewart, Jr. To permit a single settlement hearing for all of the cases, Judge Owen's cases were reassigned to Judge Stewart in February, 1976.

To date, judgments have been entered in 56 of the actions pursuant to a settlement agreement negotiated by Shea Gould. The 56 actions which the parties have settled so far include the present action as well as the five other "cleaning contractor" actions which involve the largest number of plaintiffs.

Willis v. Allied Maintenance Corporation, et al. 75 Civ. 955, is a separate action (also pending before Judge Stewart) brought by an individual member of Local 32J on her own behalf and on behalf of all present and past female cleaning and maintenance employees of Allied or its subsidiaries, including the 641 women who have specifically retained Shea Gould to bring this action. Ms. Willis asserts class action claims and individual claims against Allied Maintenance Corporation and several of its subsidiaries, Local 32J and others, alleging that they have discriminated against her in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2, and other statutes. Ms. Willis' class action motion was granted on February 17, 1976.

Shea Gould does not represent any party in the Willis action.

Approximately one month before her action was declared a class action, however, Ms. Willis' attorneys had reached a settlement of her claims against defendant Allied. The settlement, by its terms, is binding on all members of the Willis class, including the plaintiffs-appellants in this action, Nurse v. Allied, and would provide financial benefits to members of the class which are identical to those contained in the settlement which Shea Gould has negotiated in this action and in the other equal pay actions pending in the District Court. In addition to its financial terms, however, the Willis settlement contained other terms which Shea Gould believed would have deprived its clients of rights under their collective bargaining agreements. On January 27, 1976, Shea Gould and Local 32J attempted to communicate their views to the District Court, but Judge Stewart refused to hear them on the matter (A 178) and told Mr. Finneran, a member of Shea Gould, that he should make his views known directly to his clients. Shea Gould attempted to do so and asked Local 32J to call a meeting of its members who would be affected by the Willis settlement so that Shea Gould and Local 32J could advise them of their opposition. Notice of the meeting was sent to the members, and, thereupon, on February 17, 1976, the attorneys for Ms. Willis, contending that Shea Gould's opposition to the Willis settlement was motivated by a desire to protect Local 32J instead of Shea Gould's individual clients, presented Judge Stewart with an order to show cause in support of a motion to disqualify Shea Gould as counsel to plaintiffs in this case.* The order to show cause also contained a proposed

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* In connection with plaintiff Willis' motion to intervene in this case (which was submitted in October, 1975) she had alleged that Shea Gould had a conflict of interest in representing both 32J (as general counsel) and its individual members (as plaintiffs). She did not, however, make any motion to disqualify Shea Gould and the Court did not then suggest that it viewed Shea Gould's continued representation of plaintiffs as improper in any way. The motion to intervene was not decided until February 17, 1976, and the Court's decision on the motion was read into the record at the beginning of the hearing on February 17, 1976, which was called for the purpose of allowing counsel to be heard on the question of whether the Court should sign the order to show cause and temporary restraining order.

temporary restraining order which would have prevented Shea Gould from, among other things, "exerting...influence of any kind...to persuade" members of the Willis class to oppose the Willis settlement. At approximately 1:00 P.M. on February 17, 1976, Shea Gould was advised that Judge Stewart would hear argument at 3:30 P.M. on that date to determine whether he should sign the proposed order to show cause and temporary restraining order.

During the argument, a member of the Shea Gould firm advised Judge Stewart that Shea Gould wanted to have a full hearing with respect to the application for disqualification (see, e.g. A 7). Nevertheless, after making certain modifications, Judge Stewart signed the order to show cause and temporary restraining order making it returnable at 10:00 A.M. on the following day, February 18, 1976.

Meanwhile, apparently recognizing that the proposed Willis settlement agreement might have the adverse effects which Shea Gould had complained of, on February 17, 1976, the attorneys for plaintiff Willis and the attorneys for defendant Allied entered into a supplementary memorandum of understanding (dated February 17, 1976) which provided explicitly that nothing in the Willis settlement could deprive any member of the class of any rights or benefits provided in any collective bargaining agreement (Transcript of proceedings of February 17, 1976, page 26).

As a result, on February 18, 1976, the attorneys for all parties conferred and resolved their differences in a seven point stipulation which was entered on the record and approved by the Court (A 9 - A 10). In accordance with the stipulation, Shea Gould agreed to withdraw its objections to the Willis settlement and counsel for Willis withdrew their motion to disqualify Shea Gould as plaintiffs'

counsel in this case.

Because of this resolution, no argument was held with respect to the motion to disqualify. Shea Gould submitted no affidavits and presented no evidence.

Athough he had accepted the stipulation, which included the withdrawal of the motion to disqualify Shea Gould, and commended counsel for their efforts to resolve the controversy (A 10), Judge Stewart signed an order during the afternoon of February 18, 1976 on his own motion disqualifying Shea Gould as plaintiffs' counsel on the alleged basis of "undisputed facts" disclosed during the hearings on February 17 and 18, 1976.

As noted above, plaintiffs and Shea Gould appealed, and this Court remanded the action for the limited purpose of adducing additional evidence on the issue of disqualification.

All of these prior proceedings are significant because they demonstrate that:

(a) Counsel for Ms. Willis charged Shea Gould with a conflict in October 1975, but neither Ms. Willis nor the Court then moved to disqualify Shea Gould;

(b) thereafter, Shea Gould negotiated a settlement agreement which Ms. Willis adopted as the basis for her own class settlement and which the Court found was "fair, equitable and appropriate for its approval;"

(c) Ms. Willis moved to disqualify Shea Gould because Shea Gould opposed certain aspects of her settlement; when she and Allied agreed to supplement their settlement to protect the rights which concerned Shea Gould, Shea Gould withdrew its opposition, and she withdrew her

motion to disqualify Shea Gould;

(d) the District Judge thereupon disqualified Shea Gould on his own motion without a hearing, and, after his order was stayed, he entered judgment approving the settlement which Shea Gould had negotiated.

(e) despite the entry of judgment, the District Judge refused to vacate his disqualification order as moot and the evidentiary hearings proceeded.

(d) The Question of Counsel Fees.

The industry-wide settlement agreement which the District Court approved provides that the defendants in the equal pay actions will pay plaintiffs' attorneys fees and expenses in the aggregate amount of $300,000, subject to the approval of the District Court (See Exhibit "A" to the judgment entered herein on March 1, 1976, paragraph 7).

This Court's order remanding the action for hearings on the issue of disqualification expressly provides that the stay of the disqualification order is without prejudice to the right of any party to assert the disqualification as it pertains to attorneys' fees (A 4). When Judge Stewart made his order disqualifying Shea Gould, Shea Gould had not applied for approval of its fee and has not yet done so. Although Shea Gould will contend that the fee which defendants have agreed on should be paid to it regardless of the outcome of the present appeal, the fee issue is not presently before this Court and has not yet been passed upon by the District Court.

(e) The Evidence Adduced on Remand

The testimony and exhibits introduced during the hearings on remand established not only that the order of disqualification should be vacated as moot

but also that there was simply no basis for the Judge's belief that Shea Gould's representation of plaintiffs resulted in a conflict of interests. We will summarize the evidence briefly.

(1) collective bargaining history

Local 32J is a labor union which represents approximately 11,500 women and 3,000 men who are employed in cleaning and maintaining office buildings in the City of New York (Baumann, A 26).

Local 32J negotiates with two associations which act as collective bargaining agents for a number of separate employers: The Realty Advisory Board on Labor Relations, Inc. (the "RAB") and The Building Service League (the "BSL"). The RAB represents a number of building owners and managing agents who employ members of Local 32J, and its collective bargaining agreements with Local 32J govern the terms and conditions of employment for approximately 10,000 Local 32J members who are employed directly by building owners or managing agents or by cleaning contractors which have contracts with building owners (Baumann, A 27). The BSL represents cleaning contractors, and its agreements with Local 32J govern members who are employed by cleaning contractors which have contracts with individual tenants rather than with building owners (Baumann, A 26 - A 27).

In its negotiations with the RAB, the BSL and others, Local 32J follows the procedures set out in its constitution and by-laws, which provide that all negotiations shall be conducted by a negotiating committee "subject to the mandate of the membership" (Plaintiffs' Exhibit 2; A 160 - A 161). Each negotiating committee is elected by the members who will be affected by the particular negotiations (Baumann, A 31). In the case of RAB negotiations the committee generally consists of approximately 90 members, and in the case of BSL negotiations it generally

consists of approximately 50-55 members (Baumann, A 32). The affected members also formulate collective bargaining demands (Baumann, A 31), which the negotiating committee then presents to the employers. After the negotiations have been concluded by the negotiating committees, the proposed contract is subject to ratification by the members. Although not all of the affected members attend the ratification meetings, all members are given notice of the meetings (Baumann, A 126). The collective bargaining agreements entered into by Local 32J with the BSL and the RAB in 1971 and 1972 were ratified unanimously by the members present at the ratification meetings (Baumann, A 125).

(2) attempts to eliminate sex related job classifications

Prior to 1971, the collective bargaining agreements with the BSL contained two classifications -- "male cleaners" and "female cleaners." The RAB agreement contained one classification -- "female cleaners."

In its 1971 collective bargaining negotiations with the BSL, Local 32J insisted that sex related job categories be abolished and that pay differentials be based upon job duties (Baumann, A 33). The negotiations began in February 1971 and culminated on April 8, 1971 with the ratification of a new agreement which became effective on May 1, 1971 (Baumann, A 31). The new agreement (Plaintiffs Exh. 1) divided employees into two categories: "Maintenance Cleaners I" and "Maintenance Cleaners II" (Baumann, A 29). In addition, the agreement specifically prohibited discrimination based on sex (Plaintiffs' Exh. 1; A 159). Maintenance I cleaners generally performed "light cleaning" tasks and Maintenance II cleaners generally performed "heavy cleaning," tasks (Baumann, A 28) and received higher pay than Maintenance I cleaners. The categories were not, however, restricted to males or females. There have been some men in the Maintenance I

category and some women in the Maintenance II category (Baumann, A 30). Local 32J's President testified that the Union had never discouraged or prevented female members from seeking jobs in the higher paying Maintenance II category (Baumann, A 30, A 34) and his testimony was uncontradicted.

As noted above, Local 32J's agreement with the RAB contained only one category of workers (Baumann, A 27). In the contract which became effective on January 1, 1972, this category was designated "Office Cleaner" and a provision was inserted into the agreement prohibiting any discrimination by reason of sex (Baumann, A 36). The "office cleaners" represented by Local 32J under the RAB Agreement generally performed "light cleaning" corresponding to the Maintenance I category (Baumann, A 35). Although the "office cleaners" are mostly women, the category is not restricted to women and some men do work as "office cleaners" (Baumann, A 28). In buildings governed by the RAB Agreement, the "heavy cleaning" is not performed by Local 32J office cleaners but by "porters" who are represented by Local 32B, a different Union (Baumann, A 39). The Local 32B porters received a rate of pay which was higher than the pay of the "office cleaners" and approximately equal to the pay received by Local 32J's Maintenance II cleaners in the BSL Agreement (Baumann, A 39).

(3) the decision to seek equal pay for all members

Despite the attempts which were made in the 1971 BSL Agreement and the 1972 RAB Agreement to eliminate discrimination by reason of sex and to base pay classifications on job duties, Local 32J began to receive complaints from its members that those in the "light cleaning" categories were being required to do the work which should have been done by porters or by Maintenance II cleaners (Baumann, A 38; A 40). In an attempt to eliminate this problem, Local 32J de-

manded that the BSL meet with the Union to reduce to writing the specific job duties of the Maintenance I and Maintenance II categories (Baumann, A 38). These meetings resulted in the execution of Plaintiffs' Exhibit 3, on or about July 26, 1973, which contains detailed descriptions of the job duties of the two categories. Despite this attempt to define the job categories more specifically, however, the complaints from members continued, and, because of the size of Local 32J and its inability to police all of the different places of employment, it concluded that its so-called light cleaners were already working as hard as any porters or heavy cleaners and that the only way it could protect its members would be to "make an all out effort to achieve equal pay for all our members so that there would no longer be a problem as to overlapping of duties; all the members would receive the same rate of pay, male or female" (Baumann, A 42), without any change in job content (Baumann, A 64).

(4) the Macke negotiations and strike

Local 32J's first opportunity to demand equal pay after being unable to resolve the problem of overlapping job duties came in the collective bargaining negotiations in October, 1973 with the Macke Company (Baumann, A 40) which was scheduled to take over the cleaning operations for First National City Bank at 399 Park Avenue (Baumann, A 37). Local 32J demanded that Macke pay its 32J office cleaners the same rate of pay as the Local 32B porters in the same building (Baumann, A 40). Macke refused, and at the end of January, 1974 Local 32J called a strike against Macke which lasted for seven weeks and cost Local 32J approximately $70,000 in strike benefits (Baumann, A 41). Ultimately, Local 32J agreed to a settlement which cut the pay differential between the Local 32B porters and the Local 32J office cleaners at 399 Park Avenue in half (Baumann, A

41).

(5) the 1974 BSL negotiations

Local 32J's decision to seek equal pay for all of its members was a joint decision which the Union leadership and membership reached together while formulating and presenting collective bargaining demands in accordance with the procedures laid out in the Constitution and By Laws. While the Union was on strike against the Macke Company, it was also preparing for its negotiations with the BSL, which were scheduled to commence in the Spring of 1974. In a meeting held on February 7, 1974, the executive board of the Union resolved to secure equal pay for all members of Local 32J (Plaintiffs' Exhibit 6A 164). On February 20, 1974, the members employed under the BSL agreement met to elect a negotiating committee and to formulate demands -- among them, a demand for equal pay (Plaintiffs' Exhibit 7, A 54). At a general membership meeting of the Union held on February 23, 1974, the members ratified the action taken by the executive board on February 7, 1974 (Plaintiffs' Exhibit 7, page 1) and were advised that the Union would take all steps necessary to obtain equal pay for all its members.

In accordance with the mandate of the executive board and the membership, the Union demanded equal pay without any change in job content in the BSL negotiations (Baumann, A 46-A 47) and, at the same time, consulted with its attorneys, Shea Gould, to determine how it could best obtain equal pay for all of its members (Baumann, A 43).

The BSL rejected Local 32J's demands for equal pay and stated that, since its members were cleaning contractors who were in the employ of the landlords, they could not agree to equal pay unless and until the landlords did so (Baumann, A 47-A 48).

The cleaning contractors and Local 32J settled their collective bargaining negotiations in or about April 1974 without resolving the equal pay issue. Like the previous BSL agreements, however, the BSL Agreement which became effective on May 1, 1974 did contain a clause which provided that the BSL would automatically pay whatever increase the Union could get in its RAB negotiations for the contract commencing on January 1, 1975 (Plaintiffs' Exhibit 5; Baumann, A 48).

(6) The commencement of equal pay lawsuits.

Shea Gould advised Local 32J that the most expeditious way of securing equal pay for its members from their employers would be for the individual members to file actions against their employers under the Equal Pay Act (Plaintiffs' Exhibit 8; A 57). Such actions would avoid the administrative delays inherent in proceedings before the EEOC under Title VII of the Civil Rights Act of 1964, and would provide the most expeditious way of obtaining monetary relief for the individual Union members (Hecker, A 79). In accordance with Shea Gould's advice, Local 32J recommended to its individual members that they sign consents to sue authorizing Shea Gould to commence equal pay actions against their employers on their behalf. At a general membership meeting held on June 1, 1974, Mr. Baumann explained the Union's recommendation, read the consent forms to the members, and advised the members that Shea Gould was a firm which had "always represented the best interests of the Union and its members." (Plaintiffs' Exhibit 8, A 58). Each consent form bears the heading "CONSENT TO BE JOINED AS PARTY PLAINTIFF TO PROSECUTE CLAIMS AGAINST EMPLOYER PURSUANT TO 29 U.S.C. §216(b)" (Plaintiffs' Exhibit 4; A 162).

The Union delegates distributed and collected these consent forms at

the buildings where its members were employed and were available to answer any questions which the members might have about the consent forms (Baumann, A 127-A 128). During the following months, Shea Gould commenced approximately 75 equal pay actions on behalf of approximately 6,600 individual members of Local 32J who had signed consent forms.

Before commencing the actions, Shea Gould advised Local 32J that the employers would probably assert third party claims against the Union (Baumann A 62), and, when they actually did so, the members expressed their solidarity on the equal pay issue by resolving that, if judgments were obtained against the Union, the members would enact a special assessment to satisfy them (Plaintiffs' Exhibit 12, Minutes of December 14, 1974). The testimony was clear that Shea Gould did not advise the Union with respect to such an assessment (Baumann, A 111).

(7) settlement negotiations

In or about October 1974, Local 32J began collective bargaining sessions with the RAB. Because of the pendency of the equal pay lawsuits and the potential exposure of the RAB, the RAB negotiators refused to consider any pay increases for Local 32J unless and until the equal pay cases could be settled (Dicker, A 154-A 155). At the instance of the RAB, the collective bargaining negotiations and settlement negotiations were combined (Dicker, A 137).

In or about June 1975, Local 32J, the RAB and the Equal Pay Act plaintiffs reached a collective bargaining agreement and settlement agreement which was subject to the approval of the Department of Labor (Baumann, A 66). The agreement would have provided for pay increases beginning on January 1, 1975 which, by a series of steps, would result in equal pay by the end of the agreement (Plaintiffs' Exhibit 9A). Although the Department of Labor initially approved the

agreement it withdrew its approval in September 1975 and advised Local 32J and the RAB that it would not approve any agreement which did not provide for "immediate" equal pay (Baumann, A 66). The Labor Department advised the parties that compliance with the requirement need not cause the employers to pay any more money than the original settlement agreement, however, and that, by deferring the initial raises to be paid under the agreement, the employers could provide "immediate" equal pay without increasing their total economic burden (Baumann A,68). After further negotiations, a modified agreement was reached in or about December 1975, which was ultimately approved by the Department of Labor and by the District Court, which entered a judgment approving the agreement on March 1, 1976 (A5). The Court found that the agreement was "fair, equitable and appropriate for its approval."

(8) information provided to members

During the negotiations, Local 32J reported to its members in detail, at executive board and general membership meetings, about the progress of the bargaining (Plaintiffs' Exhibits 11 and 12). In addition, Local 32J sent its members a number of communications which informed them of the terms and effects of the proposed settlement. In August 1975, for example, Local 32J sent all of its members a brief letter in five languages explaining that a collective bargaining agreement and equal pay settlement had been reached and that, in order for it to be effective, it would have to be approved in writing by the members of Local 32J (Plaintiffs' Exhibit 9). Attached to the letter was a form of consent and release, also printed in five languages, which the members were asked to sign and return if they agreed to the settlement. In addition, the settlement agreement itself was printed and distributed in full together with the complaint in Willis v. Allied

Maintenance Corporation (Plaintiffs' Exhibit 9A). The letter which the Union sent to its members advised them that the Willis complaint was being distributed because, although the Willis case was not being settled by the agreement, the settlement of the equal pay actions might have an effect on the Willis case (Plaintiffs' Exhibit 9). The consents and releases themselves also referred to the Willis case and to the possibility that some rights asserted there might be compromised by the equal pay case settlement. It must be emphasized, however, that the only claims which were affected by the releases were claims which the members might have against their employers (Plaintiffs' Exhibits 9 and 10; A 165-A 166). No claims which the members might have against the Union were ever compromised as a result of the original equal pay settlement or the modified equal pay settlement.

On October 3, 1975, Local 32J distributed to all of its female members a more detailed explanation of the settlement agreement, again printed in five languages (Plaintiffs' Exhibit 13). This communication clearly advised the members that Darlene Willis had commenced an action against the Union. The letter stated:

> "In addition, you should know that, by consenting to the Agreement, you may be giving up claims which Darlene Willis, one of our members, is trying to make on behalf of some of our members in a lawsuit against Allied Maintenance Corporation, and others, including Local 32J. We distributed copies of the complaint in Ms. Willis' lawsuit with the Settlement Agreement. In her lawsuit, Ms. Willis claims that the women members of Local 32J employed by Allied have not been given an opportunity to do work which pays the same wages as the men receive or provides the same benefits, that they have not been given the opportunity to work the same hours as the men, and that they are entitled to equal pay immediately and to back pay for Allied's past failure to give them equal pay. Ms. Willis claims that the Union has not represented its female members properly because it has not obtained equal pay for them. Ms. Willis also makes other claims and you should read her complaint carefully." (A 167).

The letter advised each member who had already consented to the settlement that she could withdraw her consent and that she could direct any questions she might have to Shea Gould or to other counsel of her choice.

In January 1976, after the modified agreement had been negotiated, Local 32J sent another communication to its members, in five languages, describing the way in which the modified agreement was different from the one which had been submitted to the members for approval in August 1975. The letter again gave members the opportunity to withdraw their consent to the settlement, and a revocation form was attached directly to the letter (Plaintiffs' Exhibit 14).

In addition, the modified agreement was presented to the members for ratification as a collective bargaining agreement and was ratified (Baumann, A 104-A 126).

(9) settlement of the Willis case

The Willis case, as against Allied, the RAB and the BSL, was settled on the very same financial terms which were provided in the industry-wide settlement agreement negotiated by Local 32J and Shea Gould, except for Darlene Willis herself. Under the Willis settlement, she receives approximately $10,500 in settlement of her claims, ($6,500 for the equal pay claims, and $3,000 for her Title VII claims) while the other members of the class which she has been authorized to represent receive $100 in back pay plus equal pay from October 1, 1975, the same amount as is provided in the industry-wide settlement. No one has ever explained why Ms. Willis' individual recovery is so much higher than that of the class members she was authorized to represent. The Willis consent decree was also approved by the Court (Court's Exhibit K).

(f) The Charges of Conflict.

The District Court purportedly based its order disqualifying Shea Gould

upon the "undisputed facts" disclosed at hearings held on February 17 and 18, 1976, but the Court made no findings with respect to the particular facts which it relied on. The District Court obviously believed the charges made in Darlene Willis' motion to disqualify Shea Gould as counsel to plaintiffs in these proceedings, although Ms. Willis voluntarily withdrew that motion on February 18, 1976, as part of a broader stipulation which the District Court approved. Nevertheless, it is apparent that the charges made in Ms. Willis motion were the source of the District Court's belief that Shea Gould's representation of plaintiffs in this case involves a "conflict of interest." Accordingly, we will briefly list the charges which Ms. Willis made and demonstrate how the facts adduced at the hearings on March 5, 11 and 12, 1976 disproved each of those charges.

While the attorneys for Darlene Willis withdrew their motion to disqualify Shea Gould, they were invited by the Court to appear at the hearings as amici curiae (Order dated March 3, 1976, A 2). In considering whether the facts adduced at the hearings support Ms. Willis' charges, it is important to keep in mind that her attorneys had a clear adversary interest which they sought to promote in those hearings despite their designation as amici curiae. Darlene Willis' principle charge against Shea Gould arose out of her allegation that Local 32J itself has created and fostered discrimination against women. In disproving the charges against itself, Shea Gould necessarily had to show that Local 32J has always promoted the interests of its members and that its interests have always been identical to the interests of its members. In attempting to prove the contrary, Ms. Willis' attorneys were necessarily acting in an adversary capacity, and by permitting such attorneys to appear, to cross-examine witnesses and to present testimony at the hearings, the Court, we submit, improperly created an adversary

proceeding where none should have existed. See, e.g., Lefrak v. Arabian American Oil Co., slip op. 1037 (2d Cir. Dec. 12, 1975). Nevertheless, although Ms. Willis' lawyers had a clear adversary interest and although they were given every opportunity to do so by the Court, they offered no evidence whatsoever to show that Local 32J had discriminated against its female members in any way.

In a supplemental memorandum of law in support of their motion to disqualify Shea Gould (i.e., the motion which was withdrawn), Ms. Willis' attorneys expressed their charges against Shea Gould as follows:

> "1. Shea Gould has been General Counsel to defendant Local 32J since at least 1959.
>
> 2. Shea Gould has participated in negotiating Local 32J's collective bargaining agreements, which form the basis for the Willis and Nurse actions.
>
> 3. Shea Gould was responsible for deciding in the Nurse case which claims to pursue and which parties to name as defendants while representing the union (subsequently named a defendant in Willis and a third-party defendant in Nurse) and the plaintiff union members.
>
> 4. Shea Gould appeared as counsel to respondent Local 32J in the Willis proceedings before the EEOC.
>
> 5. Shea Gould has appeared in negotiating sessions in Willis and Nurse on behalf of both Local 32J and the Nurse plaintiffs."

In addition, it was alleged that Shea Gould and Local 32J had disseminated false information to members of Local 32J with respect to the effect and provisions of the proposed Willis settlement.

We will deal with each of these allegations separately.

(1) representation of Local 32J as general counsel.

The allegation that Shea Gould has been counsel to Local 32J since 1959 is not disputed, but standing alone it certainly does not establish that Shea Gould

should be disqualified from representing individual members of the Union in lawsuits against their employers. Indeed, we will show below that representation of Union members by Union counsel in employment matters is common and has the express approval of the United States Supreme Court and the New York State Bar Association's Committee on Professional Ethics.

(2) assistance in collective bargaining negotiations.

While it is true that the collective bargaining agreements form the basis, in part, of the Willis case, there is no allegation in the Nurse case that such agreements are discriminatory, and for good reason. While Ms. Willis alleges that the employers have maintained sex-segregated job categories, and have prevented women from obtaining jobs in the higher paying categories, the Nurse plaintiffs allege simply that all women are entitled to equal pay for the work which they are now doing. By alleging that the female members of Local 32J should be given greater access to the jobs generally performed by the Local 32B porters, Ms. Willis tacitly admits that there is a legitimate difference between their job duties and that the difference justifies a wage differential. If Ms. Willis succeeds on that theory, then the "light" cleaners could be forced to do "heavy" cleaning to obtain higher pay, or female members could be required to work longer or different hours which would not be compatible with their family and personal responsibilities and desires. For these very reasons, the members of Local 32J expressly directed the leadership to seek equal pay without permitting any change in job content (Baumann, A 47, A 65; Plaintiffs' Exhibit 12, minutes of, e.g., March 22, 1975). The settlement agreement which Shea Gould and Local 32J negotiated provides equal pay for all members but expressly preserves the present content of the jobs. Under the agreement, employers may not require the members of Local 32J to perform

any duties other than those which they are presently required to perform. Shea Gould's negotiation of the collective bargaining agreements results in a conflict only if Shea Gould, to prove plaintiffs' case, must allege that the agreements are discriminatory. Shea Gould, the plaintiffs in Nurse, the Union leadership and the members of Local 32J deliberately chose not to make that allegation in the equal pay cases because they did not want to allow the employers to make any change in job content.

Moreover, the collective bargaining agreements negotiated by Local 32J since 1971 have expressly forbidden any discrimination based upon sex. Thus, the fact that Shea Gould has assisted Local 32J in negotiating those agreements cannot be the basis for any charge of conflict of interests.

(3) alleged responsibility for choosing defendants.

The allegation that Shea Gould was responsible for choosing which defendants to proceed against is directly contrary to the facts which were adduced at the hearings, and it misconceives and misstates Shea Gould's role as counsel to the female members of Local 32J. The facts adduced at the hearings demonstrated clearly that Local 32J and its members came to Shea Gould for advice as a single entity united against a common enemy, the employers. The Union's objective—which was arrived at by the democratic process set out in Local 32J's constitution and by-laws—was to get equal pay for its members from their employers either through collective bargaining or, if necessary, through legal proceedings. Given this objective, it was neither necessary nor appropriate for Shea Gould to suggest to the members of Local 32J that they should sue their Union and thereby weaken the Union's ability to obtain equal pay in collective bargaining (cf. Crowley, A 89-A 90).

Moreover, and perhaps more importantly, the only basis for suggesting that Shea Gould should have advised the members to sue the Union is the assumption that there is a valid claim against the Union for discrimination or for failure to represent its members fairly and adequately. In fact, there is no basis whatsoever for such a claim. The facts adduced at the hearing demonstrated clearly that Local 32J had, throughout the collective bargaining negotiations, since at least 1963, made efforts to eliminate or, at least reduce, the differential between the pay received by its members and the pay received by the members of Local 32B, but had been unable to eliminate it because of its weak bargaining position (Dicker, A 149-A 150; Baumann, A 95-A 96). In 1971 and 1972 the Union demanded and obtained anti-discrimination clauses in the collective bargaining agreements (Plaintiffs' Exhibit 1; Baumann, A 33, A 36). And, the uncontradicted testimony of Mr. Baumann demonstrated that the Union has never prohibited or discouraged any of its members from seeking jobs in different categories (Baumann, A 34-A 76). Indeed, the testimony demonstrated that some female members have obtained jobs as Maintenance II or "heavy" cleaners and that some male members have taken jobs as "light" cleaners (Baumann, A 28-A 30).

Thus, there is no basis whatsoever for the suggestion that when Local 32J and its members came to Shea Gould as a unit determined to obtain equal pay from the employers, it was necessary for Shea Gould to identify the potential defendants for them. And it is absurd to suggest that Shea Gould should have advised the members that their Union, which was the only entity doing anything at all to obtain equal pay for them, should be added to the list of defendants with the employers.

(4) representation in the Willis administrative proceedings

The next allegation is that Shea Gould represented the Union in ad-

ministrative proceedings which Darlene Willis brought before the Equal Employment Opportunities Commission ("EEOC"). According to the uncontradicted testimony, however, the EEOC held no hearings and gave the Union no opportunity to appear or present evidence. After the EEOC made its determination of probable cause in June 1973, there was one conciliation session at which Shea Gould represented the Union (Baumann, A 139-A 140); and that was the full extent of Shea Gould's participation in the Willis matter.

It is interesting to note that, in 1971, while the EEOC was presumably conducting its ex parte investigation, Shea Gould represented Darlene Willis herself in a grievance proceeding against her employer and succeeded in having her reinstated to her job (Baumann, A 60).

It is also interesting to note that, on September 25, 1970, Ms. Willis filed a complaint with the New York State Executive Department, Division of Human Rights, charging Local 32J:

> "....with an unlawful discriminatory practice relating to employment by denying her equal terms, conditions and privileges of her employment because of her sex, in violation of the Human Rights Law of the State of New York." (A 172)

After an investigation, the complaint was dismissed (Plaintiffs' Exhibit 17, A 173).

On August 23, 1972, Ms. Willis made a charge against Local 32J before the National Labor Relations Board, alleging that Local 32J had failed to process her grievances "for arbitrary, invidious and unfair reasons." After an investigation, the NLRB refused to issue a complaint (Plaintiffs' Exhibit 16; A 170-A 171).

(5) representation in settlement negotiations.

Next, Ms. Willis contended that it was improper for Shea Gould to represent both the Union, as its general counsel, and the plaintiffs in the Equal Pay

Act cases during settlement negotiations which led to a joint collective bargaining agreement and settlement agreement. If, in fact, as we believe we have demonstrated, the Union and its members had the same objective in collective bargaining as they had in bringing these lawsuits, then we submit that it was entirely proper for Shea Gould to represent both the Union and its members in the joint collective bargaining and settlement negotiations. Moreover, it was at the insistence of the RAB that the negotiations were combined, because they refused to negotiate any collective bargaining increases unless and until the equal pay cases could be disposed of (Dicker, A 155).

Most importantly, no one has contended that Shea Gould's representation of both Local 32J and its members in these joint negotiations resulted in any harm or prejudice to them. Although Ms. Willis has repeatedly contended that the original agreement which Shea Gould had negotiated did not even provide "minimal" compliance with the Equal Pay Act, the charge is a synthetic one, which truly exalts form over substance. The hearings demonstrated conclusively that the modified agreement, which was entered into at the insistence of the Department of Labor, did not cost the employers one more cent than the original agreement (Baumann, A 115). It was only by deferring some of the benefits which were provided in that agreement that the Labor Department was able to produce the cosmetic change which it wanted and obtain "immediate" equal pay. Ms. Willis herself agreed to a settlement which provides the members of her class with precisely the same economic benefits as they would obtain under the industry-wide settlement agreement negotiated by Local 32J and Shea Gould. And, as the testimony demonstrated, the settlement agreement, which the Court found to be "fair, equitable and appropriate," will result in total benefits of $60,000,000 to Local 32J

members (Baumann, A 72).

(6) opposition to the Willis settlement.

Finally, it was suggested that Shea Gould's opposition to the Willis settlement, as originally proposed, was not interposed in good faith, and that, by advising its clients to object to that settlement agreement Shea Gould was, in fact, promoting the interests of Local 32J and not the interests of the plaintiffs. Shea Gould's objections and those of Local 32J were based on the very real possibility that the Willis consent decree, as originally drafted, would deprive the members of Local 32J and Shea Gould's individual clients of two important benefits which they had obtained through collective bargaining: extra pay for the work of absentees, and company-wide seniority. Under Local 32J's collective bargaining agreements, when a cleaner is absent, the other workers in that area are assigned his or her job duties and are given his or her salary without having to put in any additional time. Under the Willis decree, this additional compensation would be jeopardized because all overtime wages would be paid at the same rate as those paid to members of Local 32B, who do not have the benefit of the "work of absentees" clause (Baumann, A 117). The second benefit which was threatened by the Willis settlement was the "company-wide" seniority clause. Under that clause, members of Local 32J do not lose any seniority when they are transferred by a contractor from one building to another. Members of Local 32B do not have this benefit and, by placing the members of Local 32J on the same basis as Local 32B, this benefit would be placed in jeopardy (Baumann, A 119). It was conclusively demonstrated by the evidence adduced at the hearings that the objections which Local 32J and Shea Gould had to the Willis settlement were well founded and that, before it advised its clients to object to the Willis settlement, Shea Gould made every effort to

communicate its objections to the District Court and to counsel involved in the Willis case, only to be brushed aside and ignored on the ground that Shea Gould had no "standing" in the Willis case. (Plaintiffs' Exhibit 18, A 178-A 179).

(e) Summary.

We respectfully submit that the facts adduced at the hearings established everything which Shea Gould told this Court it could establish if it were given the opportunity to present evidence at a hearing, namely:

> (a) that the interests of Local 32J and its individual members with respect to equal pay are not in conflict;
>
> (b) that the collective bargaining agreements negotiated by Local 32J do not provide for or foster sexual discrimination, but that the discrimination results from the employers' disregard of the provisions of the collective bargaining agreements;
>
> (c) that Local 32J has not promoted sexual discrimination, but, in fact, has been the motivating force behind the commencement of lawsuits by its members for equal pay and the ultimate settlement of those lawsuits by an agreement which provides for immediate equal pay;
>
> (d) that Shea Gould's representation of the plaintiffs in this case has not deprived them of any rights or compromised any rights which they might have to proceed against Local 32J;
>
> (e) that, if Local 32J had not obtained for its members counsel who are familiar with the background of the equal pay controversy and who have the full cooperation of Local 32J, the claims of its members would never have been pressed;
>
> (f) that, even if there were a conflict, the issue is now moot because the lawsuits in which Local 32J's general counsel represents its individual members have now been settled on terms which are no less favorable to plaintiffs than those reached by independent counsel for plaintiff Willis.

POINT I

THE ORDER DISQUALIFYING COUNSEL SHOULD BE REVERSED AS UNNECESSARY AND MOOT.

On at least two occasions in recent months, this Court has reaffirmed its belief that the District Court's function is to try the cases before it and not to act as an overseer of the professional ethics of lawyers who practice there unless they are accused of professional misconduct which "taints" the proceedings before the Court. In Lefrak v. Arabian American Oil Co., slip op. 1037 (2d Cir. Dec. 12, 1975), the Court cautioned against the danger of turning the District Court into a Bar Association grievance committee,* and, in W. T. Grant Company v. Haines, slip op. 2529 (2d Cir. March 9, 1976), the Court repeated its earlier admonitions.

In W. T. Grant v. Haines, supra, the Court considered an appeal from the District Court's denial of a motion to disqualify counsel. In affirming the order, the Court reiterated "that a violation of professional ethics does not, in any event, automatically result in disqualification of counsel" (slip op. at p. 2539), and

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* As this Court has said in a different context, United States v. Weinstein, 511 F.2d 622, 628 (2d Cir. 1975), cert. den., 422 U.S. 1042 (1975):

> "Ours is essentially an adversarial, not an inquisitorial, system. Whatever may be the judge's role in countries governed by a system of Civil Law, where the judge may by custom engage in investigative or prosecutorial activities, we have chosen to administer justice through courts which are limited to the adjudication of cases and controversies in an adversarial setting. See Art. III, U.S. Constitution; Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). With rare exceptions a federal court is not authorized to act sua sponte; an adversarial interest is essential."

stated (slip op. at p. 2541):

> "The business of the Court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice here unless the questioned behavior taints the trial of the cause before it.... Plaintiff has failed to establish that taint here in our judgment. If the Liebman firm is guilty of professional misconduct, as to which we express no view, the appropriate forum is the Grievance Committee of the bar association."

It has never been suggested in the instant case that the alleged conflict has in any way "tainted" Shea Gould's representation of the individual union members. In fact, the District Court has expressed its belief that the settlement agreement which Shea Gould negotiated is "in the public interest" (transcript of Proceedings on February 27, 1976, p. 18); and "an outstanding achievement" (Id. p. 20); and has stated that "the contribution here has been made almost entirely by counsel." (Id., p. 24). In the judgment which the District Court signed, it found that the settlement agreement is "fair, equitable and appropriate for its approval." The evidence adduced at the hearing on March 5, 1976, showing that the value of the settlement amounts to approximately $60,000,000 over the term of the agreement reinforces those accolades (Baumann, A 72).

Shea Gould's alleged "conflict of interest" was called to the District Court's attention in October 1975. No action was taken, and, thereafter, Shea Gould negotiated and concluded the modified settlement agreement, which has now been approved by the District Court. To disqualify counsel at this point, after a judgment has been entered and nothing more remains to be done with respect to plaintiff's claims, is inappropriate and unnecessary.

This Court has recognized that, where the disqualification will have no practical effect on the District Court's proceedings, either because the parties have resolved their differences or because the alleged breach of ethics does not

relate to the merits of the case before the Court, disqualification is inappropriate.

In Fabrikant v. Seidman & Seidman, 73 Civ. 4734 (S.D.N.Y.), the District Court entered an order dated June 23, 1975 disqualifying counsel for various parties. They appealed to this Court, and, subsequently, entered into a stipulation withdrawing from the action and agreeing to perform no further services for any party. The stipulation also provided that an order could be entered by this Court remanding the cases to the District Court with instructions to vacate the order of disqualification as moot. On September 29, 1975, this Court made an order remanding the cases to the District Court with instructions to vacate the order of disqualification, and, by order dated October 8, 1975, the District Court vacated its order. *

While we do not concede that Shea Gould has been involved in any conflict of interest, as we will demonstrate in Point II, it is clear in any event that no further substantive proceedings are required in this case. The action has been settled, and a judgment approving the settlement has been entered. The alleged conflict of interest, even if one did exist, cannot have any effect on the District Court's proceedings. Nor is there any suggestion that it has tainted the proceedings had to date. Under these circumstances disqualification is unnecessary, improper and punitive, and the order of disqualification should be reversed.

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* The docket number of the case in this Court was 75-7492.

POINT II

SHEA GOULD'S REPRESENTATION OF THE PLAINTIFFS DOES NOT INVOLVE ANY CONFLICT OF INTERESTS.

(a) Identity of a Union and Its Members

It is a legal truism that an unincorporated association has no legal existence apart from its members. It is merely a collection of individuals united for common purposes. Although New York General Associations Law § 13 provides, for convenience, that an action or special proceeding may be maintained against the president or treasurer of an association, it has been held in a number of cases that such suits against the officers of the association are limited to cases in which the individual liability of each and every member of the association can be alleged and proven. Martin v. Curran 303 N.Y. 276 (1951). As the Court stated in Matter of N.Y. Times Co. (Newspaper Guild), 2 A.D. 2d 31 (1st Dept. 1956):

> "[I]t has been held that a union is not liable for the acts of its members, in their official capacity in the absence of ratification or approval by the entire membership."

New York General Associations Law, §15 further provides that a judgment against the association's officer (when he is sued in his official capacity) may be enforced against any property belonging to the association or owned jointly, or in common, by all of its members. Where the judgment is not wholly satisfied by enforcement against property owned by the association or jointly, or in common, by all of its members, the judgment creditor may maintain an action against individual members of the association "as if the first action had not been brought." General Associations Law §16.

In order to alleviate the harshness of permitting judgments against

unions to be enforced against individual union members, Congress enacted §301(b) of the Taft-Hartley Act, 29 U.S.C. §185(b), which provides, in part:

> "Any money judgment against a labor organization in the district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

Although this section, which was prompted, as the Supreme Court said, by a "solicitude for the union members," Lewis v. Benedict Coal Corp., 361 U.S. 459, 470 (1959), insulates the individual members from liability, it remains true that a judgment against the union would merely deplete the union treasury, which the members themselves have built up by their dues and contributions.

It is true that, in some cases, individual members or minority factions may have a grievance against the Union itself, even though they are members. But plaintiffs in these Equal Pay cases certainly do not fall within that class. Here, the vast majority of Local 32J's members are female. All of the collective bargaining agreements which are challenged in the Willis case were negotiated, ratified and adopted in accordance with the Union's procedures, as set out in its constitution and by-laws. The negotiating committees included women and the negotiations included demands formulated with the approval of the entire affected membership.

Moreover, the Union members who are plaintiffs in the Equal Pay Act cases are acting entirely in accordance with the collective position of the Union, as adopted by its executive board and membership. Ms. Willis' position is that if one dissident member makes a claim against the Union, the Union's lawyers are disqualified from representing all union members on related claims. According to Mrs. Willis' attorneys, Shea Gould must be disqualified regardless of the lack of merit or inadvisability of her claim, and regardless of whether the other union

members want to assert such a claim.

We respectfully submit that a charge made by one member of the Union does not create a conflict of interest nor divide the Union from its members and that the Code of Professional Responsibility does not require such an impractical result.

(b) Application of the Code of Professional Responsibility and The Union's Right to Supply Counsel to its Members

Ethical problems "cannot be resolved in a vacuum," Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973), but rather must be weighed in the context of practical difficulties, competing ethical concerns, legislative policies, and constitutional rights. See, NAACP v. Button, 371 U.S. 415, 83 S. Ct. 328 (1963); Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1, 84 S. Ct. 113 (1964); United Mine Workers v. Illinois State Bar Ass'n., 389 U.S. 217, 88 S. Ct. 353 (1967); United Transportation Union v. State Bar, 401 U.S. 576, 91 S. Ct. 1076 (1971).

That view is also adopted in the Code of Professional Responsibility. For example, EC 5-17 refers to "typically recurring situations" involving conflicts of interest, including such volatile cases as "an insured and his insurer" and "beneficiaries of the estate of a decident." An absolutist view would bar multiple representations in both those situations, yet EC 5-17 holds that the decision "depends upon an analysis of each case."

This Court has recommended a similar, flexible approach in applying the Code to particular cases. In International Electronics Corporation v. Flanzer, Docket Nos. 75-7159, 75-7216 (2d Cir. December 22, 1975), Judge Gurfein, speaking for the Court, expressly adopted the spirit of a brief submitted by the Connecticut

Bar Association, as amicus curiae at the request of the Court:

> "It behooves this court, therefore, while mindful of the existing Code, to examine afresh the problems sought to be met by that Code, to weigh for itself what those problems are, how real in the practical world they are in fact, and whether a mechanical and didactic application of the Code to all situations automatically might not be productive of more harm than good, by requiring the client and the judicial system to sacrifice more harm than the value of the presumed benefits."

And see J.P. Foley & Co., Inc. v. Vanderbilt, 523 F.2d 1357, 1360 (2d Cir. 1975), in which Judge Gurfein, concurring, stressed the need to "prevent literalism from possibly overcoming substantial justice to the parties.":

> "First, I think a court need not treat the Canons of Professional Responsibility as it would a statute that we have no right to amend. We should not abdicate our constitutional function of regulating the Bar to that extent. When we agree that the Code applies in an equitable manner to a matter before us, we should not hesitate to enforce it with vigor. When we find an area of uncertainty, however, we must use our judicial process to make our own decision in the interests of justice to all concerned.
>
> "Second, the interests of justice in this case involve not only the ethics of the lawyer but also the rights of his client, the Foleys. Up to now this Court has been largely concerned with breaches of professional ethics caused by alleged former representations by lawyers, applying Canon 4 or Disciplinary Rule 9-101(B), though we have also painted with a broad brush using the color of Canon 9....
>
> "In Ceramco Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 271 (2d Cir. 1975), we noted that these cases were based on 'the need to enforce the lawyer's duty of absolute fidelity and to guard against the danger of inadvertent use of confidential information.'
>
> "Having made my own reservations explicit, I would also direct the District Court to give the Foleys, after affording them full information about the problem, a chance to express their own preference. That expression will, of course, not be binding on the court, but if courts are to take action that may adversely affect the client, the client should have a chance to express himself. Id. at 1395-60."

Taking a practical approach to the problem of potential as contrasted with actual conflict, the United States Supreme Court has expressly recognized the right of labor unions and similar organizations to provide counsel to their members, even at the expense of the organization, and even where there was a potential conflict between the organization and its members. In United Mine Workers v. Illinois State Bar Assn., 389 U.S. 217, 222-223 (1967), the Court, in reviewing some of its earlier decisions, stated:

> "Thus in Button, supra, we dealt with a plan under which the NAACP not only advised prospective litigants to seek the assistance of particular attorneys but in many instances actually paid the attorneys itself. We held the dangers of baseless litigation and conflicting interests between the association and individual litigants far too speculative to justify the broad remedy invoked by the State, a remedy that would have seriously crippled the efforts of the NAACP to vindicate the rights of its members in court. Likewise in the Trainmen case there was a theoretical possibility that the union's interests would diverge from that of the individual litigant members, and there was a further possibility that if this divergence ever occurred, the union's power to cut off the attorney's referral business could induce the attorney to sacrifice the interests of his client. Again we ruled that this very distant possibility of harm could not justify a complete prohibition of the Trainmen's efforts to aid one another in assuring that each injured member would be justly compensated for his injuries."

In keeping with the view of the Supreme Court, the New York State Bar Association has expressly recognized the right of a union to recommend and, in some cases, to supply counsel to its members.

In Opinion 163 of the New York State Bar Association's Professional Ethics Committee (October 9, 1970), the committee considered whether it would be proper for a lawyer to participate in a union-sponsored and financed plan for supplying free legal services to its members. The committee stated:

> "It is therefore the opinion of this Committee that a labor union may at its expense supply attorneys to its

> members in any area related to their employment or their relations with their employers including workmen's compensation, industrial accidents, arbitration of labor grievances, health and accident claims arising from employment, seniority rights, company housing, etc. The union has expertise in these areas and can exercise an informed judgment in such selection. See EC 2-7."

The committee found that the legal services which would have been provided under the plan there under consideration went beyond employment concerns and held over a dissent that it would be unethical for a lawyer to participate in the plan proposed. The committee recognized, however, that union-chosen counsel can be particularly useful and effective when representing individual members in employment matters.

If this Court applies in this case the flexible approach which it has recommended in other cases, we submit that it will conclude that the disqualification of Shea Gould will not result in any benefit whatsoever, for even if a union and some of its members can sometimes be in conflicting positions, they were not in conflict in this case.

Shea Gould was retained by the individual members, after being consulted by the Union leadership pursuant to a mandate of the executive board and the membership, to recommend the most expeditious way for the members to obtain equal pay from their employers. Shea Gould recommended actions under the Equal Pay Act because they were the most expeditious method available and because they would not involve administrative delay. When Shea Gould negotiated a settlement of the lawsuits, it prepared consents and releases which compromised only the claims against the employers. Thus, Shea Gould did not prejudice any claims which the members might have against the Union. Moreover, Shea Gould and Local 32J clearly advised the members and the plaintiffs that, in Darlene

Willis' mind, the Union was responsible for the alleged discrimination. We respectfully submit that the Code of Professional Responsibility required nothing further.

(c) District Court Precedent for Joint Representation

Although there are few cases dealing directly with the issue raised here, at least two Judges in the Southern District of New York have been confronted with the question of whether a Union's general counsel may represent its individual members in actions against their employers and have found nothing improper in such representation.

The decision which bears most closely on the case at bar is the recent Southern District pronouncement in Rosario v. The New York Times Co., 10 EPD ¶ 10,576 (S.D.N.Y. 1975), an action brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, et seq., and the Civil Rights Act of 1866, 42 U.S.C. § 1981. The complaint therein prayed, inter alia, for declaratory and injunctive relief from discriminatory employment practices, back pay, promotions and changes in seniority. While considering the EEOC's application for intervention, Judge Metzner referred to his earlier decision in the same case:

> "Some time ago defendant sought to disqualify counsel for plaintiffs because they were also the attorneys for the Union which represented plaintiffs under the collective bargaining agreement with defendant. The firm of attorneys is well known, experienced and able in the field of labor relations and related matters. I denied defendant's application because I saw no conflict of interest and because I knew that plaintiffs would be well represented, as their counsel so well argued.
>
> "In cases such as these, the public and private interests seem to merge. There is no doubt in my mind that plaintiffs' counsel are fully competent to protect the former as well as the latter. I dare say that plaintiffs' counsel are more conversant with the facts involved in this case than the applicant intervenor."

As Judge Metzner noted in his earlier decision, Rosario v. The New

York Times Co., 10 EPD ¶10,450 (S.D.N.Y. 1975), the complaint therein did not claim that the collective bargaining agreement discriminated; the gravamen, instead, was that the agreement was being discriminatorily applied. While his conclusion that there was no conflict was not predicated upon this analysis of the Rosario pleadings, it is interesting to note that the same analysis can be applied in this case, as we have already demonstrated, supra, p. 21-22.

Judge Tyler's decision in Communications Workers of America v. New York Telephone Co., 8 E.P.D. ¶ 9542 (S.D.N.Y. 1974) was cited by Ms. Willis' lawyers in support of their motion for disqualification, but an examination of the record in that case shows that it does not support Ms. Willis' position, but, in fact, supports Shea Gould's right to continue as plaintiffs' counsel.

Judge Tyler's decision in that case was made in connection with the defendants' motion for an order determining that the action could not be maintained as a class action, and for other relief. In connection with the motion, the defendants alleged that the Union could not be a proper class representative. Judge Tyler agreed on that point, and that is the proposition for which Ms. Willis' attorneys cite the case. The attorneys for the defendants in that case, however, made a further contention. They alleged that the named plaintiffs in that case, who were individual members of the Union, should also be disqualified from representing the class because they were represented by the Union's lawyers. In the memorandum of law which the defendants submitted in connection with that motion, they made the following argument:

> "Moreover, Plaintiff Trapper cannot meet the equally important prerequisite for a class representative that she herself be represented by counsel competent to pursue the claims of the class adequately. In making this assertion, Defendants do not intend in any manner to impugn the integrity or professional capabilities of Plaintiffs' counsel.

However, Defendants submit that under the circumstances of this case, Plaintiffs' counsel are not competent to represent Plaintiff Trapper on behalf of the class.

"Just as CWA's conflict of interest disqualifies it from representing the purported class, so must any party represented by CWA's attorneys be disqualified. As was held in Sperry Rand in virtually identical circumstances:

> There is no question about the competence of the firm acting as attorneys for the plaintiffs or its members. Nor is there any question that they are honorable and conscientious members of the profession. The difficulty is that because of the very nature of the conflict which exists between the interests of the union plaintiffs and the interests of the individual class members, the present attorneys for the plaintiffs are placed in an untenable professional position.

On information and belief, Defendants assert that Plaintiffs' local and national counsel represent CWA in numerous matters unrelated to the present litigation. Moreover, Plaintiffs' national counsel are representing CWA in actions similar to the instant case in other courts. Accordingly, there is every reason to believe that Plaintiffs' counsel have been selected and compensated by Plaintiff CWA alone, and that their primary allegiance must be to that party. Therefore, Defendants submit that Plaintiff Trapper cannot be deemed to be an adequate representative of the purported class, at least so long as she is represented by counsel whose primary allegiance is to a party with interests antagonistic to those of the purported class." (Memorandum of Points and Authorities dated April 5, 1974, pages 10-11, footnotes omitted)

Despite the contention that the named plaintiff and her attorneys were infected by the Union's alleged conflict of interest, Judge Tyler expressly found that the named individuals "will fairly and adequately represent the interests of the class."

Thus, Judge Tyler had before him the very contention which has been made in this case, that counsel who represent the Union cannot represent individual members of the Union in actions against their employer. He held otherwise.

The only case which we have found in which union counsel were dis-

qualified from representing individual members is Lynch v. Sperry Rand Corp., 62 F.R.D. 78 (S.D.N.Y. 1973). There, conflicts of interest caused the Court to preclude the union plaintiffs from representing a class comprised of male members. Having disqualified the unions as proper class representatives, the Court was confronted with a situation in which counsel was representing two parties in the same litigation--unions and individual members--who were already determined to have conflicting interests. Such dual representation of parties to the same lawsuit is not present here, and that is not the only obvious point of departure between Lynch and the case at bar. Defendant's contention in Lynch was that "since the union plaintiffs represent both male and female employees of Sperry, there is a serious potential conflict between the duty of the plaintiff unions to its male employee membership and their duty to female employee members." This, said Sperry, was a conflict "which relates directly to the merits of the claims of discrimination and the remedies if such claims are sustained." Id. at 83,84. While such a remedial conflict may have been at least arguably discernible in the context of the Lynch decision, the gravamen of which was the charge that the Sperry pension plans discriminated against male employees and retirees and in favor of women of the same status, no similar conflict is even arguably discernible in the context of the instant action. The gravamen of the case at bar is the question of equal pay. Under the express terms of the Equal Pay Act §6(d)(1) any remedy which may ultimately be fashioned herein may not equalize pay and benefits by lowering those of the higher paid workers. Rather, benefits which already inure to one class of the membership must, without diminution for anyone, be similarly extended to others.

(d) The Specific Charges of Conflict Here Are Without Merit

Ms. Willis does not contend that Shea Gould is representing two parties

with adverse interests in the same lawsuit. Nor does she contend that the remedy which Shea Could sought in the equal pay cases would prejudice any other client and thereby result in a conflict. Ms. Willis contends simply that if one union member believes that she has a claim against the union, then the union's counsel may not represent any individual members.

If Ms. Willis is correct, then no union's lawyers could represent its individual members; they would be disqualified whenever a single, disgruntled member brought a claim--no matter how tenuous or baseless--against the union. We respectfully submit that the issue of conflict cannot be decided without considering the tenuous nature of Ms. Willis' claims against the Union. They were dismissed by two out of three administrative agencies which reviewed them; and we have already demonstrated that they have no basis in fact. Indeed, if the law is in accordance with Judge Owen's recent decision in Walker v. Columbia University, 73 Civ. 2687 (S.D.N.Y. February 11, 1974), then her claims against Local 32J have no basis in law either.

In the Walker case, a group of female cleaning and maintenance employees of Columbia University and the Secretary of Labor sued the University to challenge the validity of a system which divided cleaning and maintenance work into "heavy" and "light" categories. The "light" cleaners at Columbia were exclusively female and the "heavy" cleaners were predominantly male, but included some females. The District Court found, as a matter of fact, that the work performed by the "heavy" cleaners was substantially more difficult and required substantially more effort than that performed by the "light" cleaners and that the wage differential was valid. The work categories established by Columbia University are strikingly similar to the "Maintenance I" and "Maintenance II" categories

established by Local 32J's collective bargaining agreements. Moreover, in dismissing claims against the Union under Title VII, the Court noted that it would give little weight to evidence of events which occurred prior to 1971, stating:

> "Whatever may have been the validity of the Title VII action had it been instituted prior to 1971, that question is not before me and I need not and do not render any conclusions thereon. While laggards in the march to equality must be judicially prodded, this is not appropriate as to those now in the flow of that march, regardless of when they joined."

The evidence here established that, regardless of what the job designations were prior to 1971, all sexual designations were removed at Local 32J's; insistence in the 1971 negotiations, and specific clauses were adopted barring sexual discrimination. Moreover, even prior to 1971, Local 32J had tried to eliminate the wage differential as between its workers and those represented by Local 32B. And, it cannot be contested that it was Local 32J which ultimately "prodded" the employers into giving all of their workers equal pay. Like the union in the Walker case, Local 32J does not require any judicial prodding.

Finally, we repeat that Shea Gould has done nothing to prejudice or compromise any member's claim or potential claim against the Union. The actions which Shea Gould commenced were brought under the Equal Pay Act, and it appears to be well settled that that statute creates no liability on the part of the union. E.g., Tuma v. American Can Company, 6 E.P.D. ¶8842 (D.C.N.J. 1973). Thus, a judgment on claims under the Equal Pay Act against an employer could not bar a suit against the union on any other theory. And, as noted above, the releases which plaintiffs signed released claims only against the employers. Ms. Willis' claims against the Union are still pending, and other members can still bring such claims if they choose to do so.

We respectfully submit that, on the basis of all of the evidence adduced at the hearings, Shea Gould's representation of the plaintiffs in this case involves no conflict of interest. That is the conclusion which was drawn from the direct testimony by the former chairman of the grievance committee of the Bar Association of the City of New York (Gates, A 83) and we submit that his conclusion was correct and should be adopted by the Court.

CONCLUSION

The District Court's order dated February 18, 1976, disqualifying Shea Gould from further representation of plaintiffs in this case, should be reversed.

Dated: New York, New York
May 24, 1976

Respectfully submitted,

SHEA GOULD CLIMENKO KRAMER & CASEY
Attorneys for Plaintiffs-Appellants

Of Counsel:

Milton S. Gould
Martin I. Shelton
Joseph Ferraro

#5236 and #5237

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In re:

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State of New York
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Harry Minott,

being duly sworn, deposes and says, that he is over 18 years of age. That on MAY 26 1976, he served 1 copy of the within Appendix and 2 copies of the within Brief in the above named matter on the following counsel by enclosing said copies in a securely sealed postpaid wrapper addressed as follows:

Proskauer Rose Goetz & Mendlesohn, Esqs.
300 Park Avenue
New York, New York 10022

(Attorneys for defendants 55 Broad Street Company, Madison Square Garden Center, Inc., U.S. Fire Insurance Company, Andros Broadway, Inc., 176 Broadway Corporation, 579 Equities, Inc., Gary Shapiro, and CIT Financial Corporation)

and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.

and depositing same at the Post Office located at Howard and Lafayette Streets, New York, N. Y. 10013.

Harry Minott

Sworn to before me this 26th
day of May 1976

Jack A. Messina

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Emmet, Marvin & Martin, Esqs.
48 Wall Street
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(Attorneys for defendant Bank of New York)

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350 Park Avenue
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Graubard Moskovitz McGoldrick Dannett & Horowitz, Esqs.
345 Park Avenue
New York, New York 10022

(Attorneys for defendant Allied Maintenance Corp.)

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Simpson, Thacher & Bartlett, Esqs.
One Battery Park Plaza
New York, New York 10004

(Attorneys for defendant Manufacturers Hanover Trust Co.)

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Seward & Kissel, Esqs.
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(Attorneys for defendant Bank of America)

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(Attorneys for Third-Party Defendant Local 32J)

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Michael D. Kaufman, Esq.
M.F.Y. Legal Services, Inc.
214 East 2nd Street
New York, New York 10009

and

Isabelle Katz Pinzler, Esq.
National Employment Law Project, Inc.
423 West 118th Street
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(Attorneys for plaintiff and applicant Willis)

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